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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 178

R. E. PECKHAM, Assignee for the Creditors of The Meyer-Kiser Bank, etc.,

Petitioner,

and

R. E. PECKHAM, Trustee,

Petitioner,

vs.

FAMILY LOAN COMPANY, a corporation, et al,

Respondents.

BRIEF OF RESPONDENT, SEABOARD FINANCE COMPANY, IN OPPOSITION TO CERTIORARI

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R. E. Peckham, as an assignee for creditors, was the plaintiff in the District Court for the Southern District of Florida, Miami Division, and as a trustee, he was also an intervenor. In his dual capacity Mr. Peckham was the Appellant in the Court of Appeals for the Fifth Circuit and is the Petitioner here. Throughout this brief he will be referred to as plaintiff. Family Loan Company and the various members of the Meyer and Maroon families, who held stock therein, will be referred to as Family, and Seaboard Finance Company, a Delaware corporation, and Seaboard Finance Company, of Florida, co-defendants in the trial court and co-respondents here, will be referred to merely as Seaboard.

For the purpose of convenience the following symbols will be used throughout this brief:

"O.R." for the original printed Transcript of Record filed in the Court of Appeals for the Fifth Circuit on December 11, 1950, in Case No. 13488.

"R" for the printed Transcript of Record filed in the Court of Appeals on August 1, 1957 in Case No. 16817.

"T" for the reporter's transcript of the testimony and proceedings in the trial court.

"PTN" for the Petition for Certiorari.

QUESTIONS INVOLVED

The position taken by the plaintiff's counsel and the matters he has argued have undergone an evolutionary process. In the trial court Family was accused of fraudulent concealment and Seaboard was alleged to be a subsequent fraudulent transferee. In the Court of Appeals plaintiff's counsel argued that, although he established a prima facie case, he was denied a fair trial because the Honorable Emett C. Choate, the resident District Judge, denied him the opportunity to make adequate discovery and preparation for trial and that the trial was, therefore, abortive and incomplete. After judgment for the defendants was affirmed the plaintiff's counsel in a petition for rehearing argued that the bias and prejudice of the Honorable Edgar S. Vaught, the trial judge, deprived him of a fair trial.

The present attitude of the plaintiff seems to be that the Court of Appeals glossed over the asserted errors of the trial court and failed in its duty by not passing upon the

question of a fair trial, and in the alternative, that if this question were decided, the decision was erroneous. The questions presented, therefore, can be succinctly stated as follows:

I

DID THE DISTRICT COURT DENY THE PLAINTIFF A FAIR TRIAL?

II

DID THE COURT OF APPEALS PROPERLY PASS UPON THE FIRST QUESTION?

STATEMENT OF THE CASE

Not only is the history of this case a long and involved one, but it grew out of facts and circumstances going back almost thirty years.

Family was incorporated in March, 1930 (R 24, T 145).

On May 12, 1931, the Meyer-Kiser Bank of Indianapolis failed (O.R. 2) and on the same day the Meyer-Kiser Bank of Miami closed its doors (O.R. 274).

On September 20, 1932 the liquidator of the Meyer-Kiser Bank of Miami recovered a judgment against Ferd S. Meyer, growing out of his statutory liability as a stockholder (O.R. 273). Thereafter on March 13, 1934 Ferd S. Meyer was discharged in bankruptcy (O.R. 286).

On October 18, 1938 the receiver of the Meyer-Kiser Bank of Indianapolis recovered a judgment against Sol Meyer in Indiana (O.R. 8), which was reduced to judgment

in the United States District Court for the Southern District of Florida on January 30, 1939 (O.R. 12).

Sol Meyer died in November, 1939 (O.R. 189, R 91) and the following year the plaintiff's predecessor instituted a suit against Ferd S. Meyer in the Circuit Court for Dade County, Florida to set aside a conveyance of a parcel of real estate made by Sol Meyer, as trustee, in 1936 (O.R. 102-112). The decree in that case was in favor of the defendant (O.R. 241).

The judgment against Sol Meyer was assigned to the Plaintiff on March 24, 1944 (O.R. 16), and the judgment against Ferd S. Meyer was assigned to the Plaintiff on February 14, 1947 (O.R. 277).

In view of the extremely critical remarks made by the Plaintiff in his brief in the Court of Appeals, in his Petition for Rehearing and in his Petition for a Writ of Certiorari in this court, it may be helpful to have, in skeletal form, a chronological table of the highlights of the litigation.

March 1, 1949 suit in the nature of a creditor's bill against Family was instituted (O.R. 1).

September 15, 1950 the Plaintiff filed his Motion for Discovery and Inspection of Documents (O.R. 293).

October 25, 1954 a Supplemental Complaint was filed making Seaboard a party as an alleged fraudulent transferee of assets of Family (R. 12).

November 19, 1954 Family and Seaboard filed their Answers and the case was at issue (R 30, 34).

November 7, 1956 a Notice of the setting of the cause for trial on February 25, 1957 was issued (Page 1-a of the Appendix to the Plaintiff's Brief in the Court of Appeals).

January 10, 1957 an Order for a pre-trial conference to be held January 25, 1957 was issued (R 69).

January 31, 1957 a postponed pre-trial conference was held with District Judge Emett C. Choate presiding (R 80).

February 21, 1957 Plaintiff filed his Motion for Continuance and argued it the same day before District Judge Choate (R 120).

February 25, 1957 trial commenced before Honorable Edgar S. Vaught, District Judge Pro Hac Vice (T 1).

March 13, 1957 trial was concluded (T 1479).

March 19, 1957 judgment was entered for the defendants (R. 172).

May 3, 1957 Plaintiff filed his Notice of Appeal (R. 183).

Subsequently and after obtaining many extensions of time to lodge the record and to file briefs and after the appeal had once been dismissed for want of prosecution and later reinstated, plaintiff finally served briefs on or about August 12, 1958. The opinion of the Court of Appeals affirming the judgment of the trial court was rendered on January 20, 1959 (PTN A 13).

THE ISSUES

Although the Plaintiff has repeatedly argued that the merits of the case were not involved in the court below and are not now before this court, nevertheless, in order to evaluate properly the Plaintiff's contentions, this court should not lose sight of the fact that the issues tried in the District Court were very simple and can be summarized as follows: 1. Did Sol Meyer invest directly in Family or indirectly through a trust created by his wife, Florence S. Meyer? 2. Did Ferd Meyer invest in Family either directly or indirectly prior to his discharge in bankruptcy, which occurred March 13, 1934? 3. Was there any fraud in the procurement of Ferd Meyer's discharge in bankruptcy?

There was no material issue insofar as Seaboard was concerned. Plaintiff alleged fraud in the issuance of stock and debentures of Family not only on the part of Sol Meyer and his son, Ferd, but also on the part of the other individual defendants and sought to subject the assets of Family to the payment of the judgments which had been assigned to him. The amendments joining Seaboard were based upon the fact that in 1953 all the outstanding stock of Family was exchanged for sixty thousand shares of the stock of Seaboard. It was alleged, in effect, that Seaboard knew that Sol Meyer and his son, Ferd, were the equitable owners of Family stock, that they controlled and manipulated its affairs, and that the stock and debentures were actually issued to the individual defendants in order to conceal assets, and that Seaboard was, therefore, a fraudulent transferee. No monetary relief was sought against Seaboard and at no time did the plaintiff seek to enjoin the individual defendants from transferring or disposing of their shares in Family

nor the shares in Seaboard which they received in exchange for the Family stock.

If the Plaintiff had prevailed in the trial court, he would have been entitled to subject the Seaboard stock held by the individual defendants to his judgment. In view of the failure to seek an injunction, notwithstanding the many allegations of fraud, and in view of Seaboard's assertions in its answer that it had no knowledge of any fraud, but on the contrary, dealt in good faith, at arm's length, and for valuable consideration, it is important to note that at the time of the exchange, the assets of Family and the sixty thousand shares of Seaboard stock were valued at $1,269,000 (Plaintiff's Exhibit 4). These shares were subsequently split two for one (T 1331), and since they are sold on both the Los Angeles and New York Exchanges, their value from day to day can be readily determined. At the time this case was decided by the Court of Appeals their value was in excess of $2,200,000 and as this brief is written, they are worth in excess of $2,800,000.

ARGUMENT

I

DID THE DISTRICT COURT DENY THE PLAINTIFF A FAIR TRIAL?

Plaintiff admits on Page 10 of his Petition that Judge Vaught was a stranger to him. He may have intended to imply that he was not a stranger to other counsel in the case. He knew, however, that Judge Vaught was a retired District Judge from Oklahoma (see Appendix B, Page 2-a, to the Plaintiff's Brief in the Court of Appeals), and during

the trial the Judge stated that he had never heard of this case or of the parties thereto until the trial started (T 211). Notwithstanding these facts, the plaintiff asserts that the judge was "saturated with prejudice" (PTN 9), which existed "throughout the trial" (PTN 7), that the bias and prejudice was "strong" (PTN 3), that the judge's conduct constituted a "flagrant and unprecedented assumption of the role of defense counsel" (PTN 18), that he interrupted the Plaintiff's questions and asked "improper and leading" questions of his own (PTN 19), that he "expressed his resentment at plaintiff's questions" and "indulged in sarcasm and derogatory statements toward plaintiff's counsel" (PTN 20), and that the trial judge "arbitrarily cut off" the case (PTN 21).

The language of the Petition is not as vitriolic as that employed by plaintiff's counsel in the Court of Appeals. Prior to the decision affirming the judgment of the trial court and the Petition for Rehearing, the Plaintiff vented his spleen more toward the resident district judge than the trial judge. On page 35 of the Appellant's Brief the plaintiff was, in all probability, criticising the Federal Rules of Civil Procedure; when he referred to "the new, subversive 'rush it through' technique", resulting in a "dangerous dogma fostered during the last twenty years by left-wingers and subversives . . . secretly designed primarily as a means for rushing and forcing left-wing social litigation through the federal courts". The plaintiff was, however, generous enough to characterize the defendants as "non-subversive".

The plaintiff has failed to advise this court that at the time of trial this was the oldest case on the docket of the court (R 108, 131), that his counsel did not bring on for

hearing his Motion for Discovery and Inspection of Documents from the time it was filed in December, 1950 until the pre-trial conference on January 31, 1957. He has also failed to advise this court that although he stated at the pre-trial conference that he would not seek a continuance (R 106), nevertheless on February 21, 1957, having known since approximately November 7, 1956 that the case was set for trial to commence February 25, 1957, he made a motion for a continuance (R 112) principally on the ground that he had not had an opportunity to examine books and records in the possession of the defendants. During the argument of that motion he failed to advise the court that on May 14, 1955 his co-counsel in Miami, Florida, wrote a letter to Seaboard's counsel stating, among other things, "We do not at this time seek to examine any records of the Family Loan **relating to the issues** in the case, such as records relating to the **ownership of Family Loan's capital stock** or records pertaining to the purchase or other dealings between Seaboard and Family Loan" (emphasis supplied) (R. 128). The plaintiff also failed to advise the trial court that his co-counsel was notified by the writer of this brief on February 18, 1957 that the records required to be produced by the court's order of January 31st had been received from Los Angeles and the same co-counsel advised this writer "that he was not interested in seeing or inspecting any of those books and documents until Mr. Darlington asked him to do so" (R 128).

The dilatory tactics of plaintiff's counsel are well illustrated by his conduct at the pre-trial conference. Although the order directed counsel to be "vested with full authority to make disclosures of fact and to admit and stipulate as to undisputed facts" (R 69-70), it became quite apparent that

plaintiff's counsel had made no attempt to do any of the things customarily expected and had not even taken the trouble to compare copies of documents attached to pleadings with the originals. He advised the court that he was "going to try" to agree with opposing counsel on the facts "as expeditiously as possible", and that he would in the future examine documents and would in the future "get together" with opposing counsel. This prompted the court to remark "Apparently you are not ready for pre-trial . . . you are just wasting the Court's time" (R 91-95).

Notwithstanding the fact that this case had been pending almost eight years, that it had been at issue for more than two years, and that it had been noticed for trial for nearly four months, the plaintiff admittedly had not prepared for trial. In fact, the first point in his brief in the Court of Appeals was to the effect that the court deprived him of the opportunity to make discovery and preparation, and throughout his argument on that point the brief is replete with expressions that he was "suddenly and unexpectedly" "pressured", "rushed", and "forced" into a "premature" and "abortive" trial.

Plaintiff's counsel has taken advantage of the burdensome amount of work imposed upon this court and undoubtedly assumes that this court does not have time to sift through the 1480 page Transcript of the trial proceedings. In fact, he seeks to prevent any inquiry into the facts by stating that he 'does not ask this court to review the merits of the evidence", and that issues relating to Seaboard are not here "for review" (PTN 2, 6). The Transcript of the proceedings clearly reveals, however, that twelve days were devoted to a "fishing expedition". The plaintiff did not even

attend the trial. He produced no witnesses nor documents of his own. Plaintiff's counsel called two of the individual defendants alternately and cross-examined them at great length and repetitiously about documents produced by the defendants. On the 12th day when the court announced that the case would be closed, plaintiff's counsel then sought a continuance for thirty days to take a deposition and to call witnesses who had not been subpoenaed (T. 1446, 1452, 1453, 1467). He also sought a continuance for the purpose of requiring the defendants to produce additional documents. After both general counsel and trial counsel for Seaboard advised the court that according to the president and the secretary-treasurer of that company, all available documents had been produced, plaintiff's counsel replied that these representations were patently based on hearsay (R.1450-1451). Early in the trial announcement was made to the Court that the president of Seaboard was in attendance so that the plaintiff's counsel could examine him and a request was made that such examination be concluded by a certain day in order to permit him to return to Los Angeles. Plaintiff's counsel indicated agreement but did not call the president (R. 331-336).

It is quite apparent, therefore, that plaintiff's counsel was trifling with the Court.

The burden of plaintiff's argument is that the questioning of witnesses by the Court, the exclusion of oft-repeated testimony and of immaterial and irrelevant matters, and comments that plaintiff's counsel was not eliciting any facts in support of the issues manifest prejudice and bias. Apparently counsel is not willing to admit that he had no case when he started and did not develop one as he proceeded.

As a result of protracted and repetitious cross-examination, the plaintiff established that Family was organized by Florence S. Meyer, the mother of the defendant, Ferd Meyer, in 1930, and that until 1940 its modest amount of capital was furnished solely from Florence Meyer's funds (T 116, 494, 532, 538, 612, 806, 838). Plaintiff further established that Sol Meyer never directly or indirectly invested any money in Family (T 217, 493-494, 545-546, 836, 896, 997, 1003, 1007, 1073). Ferd Meyer did not invest in Family until 1940, after the death of his father, Sol, (T 126, 130-131, 217, 493-494, 1003-1004) and when he did acquire an interest in Family's capital stock, none of the funds invested by him had been obtained either directly or indirectly from his father (T 836, 1227, 1228, 1262). It was also established that Hoke T. Maroon did not invest in Family or acquire any of its stock until 1940 (T 126, 130, 247, 337), and that when he did, none of the funds which he used came directly or indirectly from Sol Meyer (T 495).

That the plaintiff's purported cause of action was based solely on suspicion and not on any facts is all too apparent from an examination of the record.

The charges leveled at both the District Court and the Court of Appeals are on a par with the plaintiff's allegation in the sixth paragraph of his Intervening Claim that neither he nor his predecessor discovered "the facts constituting the aforesaid fraud" until within three years prior to filing of the said Intervening Claim (O.R. 271-272).

In the unsuccessful suit instituted in 1940 to set aside an alleged fraudulent conveyance, referred to hereinabove, Ferd Meyer was interrogated concerning any stock owned by him or other members of his family in Family Loan Company and as to whether or not any such stock was owned;

paid for, or obtained directly or indirectly from Sol Meyer. The fact of the matter is that the plaintiff has never discovered any fraud in the organization of Family or the ownership of its stock or other assets, for there was none, and the absence thereof was clearly established. The conclusion is inescapable that then, as well as now, Plaintiff's complaint was based upon speculation, conjecture, and suspicion.

The penchant of plaintiff's counsel for indulging in innuendo rather than producing facts is probably nowhere better illustrated than on the sixth page of his Petition, wherein he states that "these supplemental issues relating to Seaboard and the S.E.C. and stock exchanges", while not before the court for review, "needed to be mentioned" as showing their broad and serious character. The Supplemental Complaint and Supplemental Intervening Claim (R 12, 14) which are the only pleadings directed by the plaintiff to Seaboard contain no mention of the Securities and Exchange Commission or the stock exchanges. Seaboard's answer, however, (R 34) filed in 1954 has attached thereto a copy of the contract for the exchange of Family and Seaboard stock in which Seaboard agreed that the sixty thousand shares involved "shall be authorized for listing on the New York and Los Angeles stock exchanges prior to delivery" (R 47), a list of the subsidiaries of Family together with names and locations of all loan offices, the audit report by Ring, Mahony & Arner of Family and its subsidiaries including copies of the Comparative Consolidated Balance Sheets, Profit and Loss Statements, a list of le ses held by Family, and an Escrow Agreement. Plaintiff's counsel was, therefore, in possession of all information concerning the transaction for almost two years before the case was noticed for trial. During the trial the plaintiff introduced in evidence,

as his exhibit 4, a Securities and Exchange Commission Form 8-A and a stock exchange form A-14695 produced by Seaboard. The exhibit referred to the contract hereinabove mentioned and particularly the portion thereof in which the shareholders of Family stated that they were acquiring the Seaboard stock for investment, not resale, and contained an opinion by Seaboard's counsel that registration under the Securities Act of 1933 was not required. There is no issue on this point although plaintiff's counsel in his brief in the Court of Appeals argued that both the Securities and Exchange Commission and the stock exchanges were deceived.

If the trial judge looked with disfavor upon the wholly unsupported constant charges of fraud made by plaintiff's counsel, this is understandable, but does not constitute bias or prejudice amounting to a denial of a fair trial.

We have no quarrel with the holdings of the cases cited in the Petition. We assert, however, that any attempt to apply them to the instant proceeding constitutes a direct, flagrant attack upon the integrity of Judge Vaught.

In **Knapp v. Kinsey** (6 Cir. 1956) 232 F. 2d 458, 466, cited by the plaintiff in his Petition, the court said:

> "The bias or prejudice which will disqualify a judge must be 'personal' bias or prejudice as distinguished from a judicial one. . . . Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law, which may have been expressed by him in some prior case. . . . Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice."

In **Montrose Contracting Co. v. Westchester County,** (2 Cir. 1938) 94 F. 2d 580, 583, quoted in the Knapp case supra, the court said:

". . . It has often been repeated that a trial judge in the federal courts is more than a mere arbitrator to rule upon objections as to evidence and to instruct the jury as to the law. He may and should take an active part in the examination of witnesses if he considers that the course of justice requires it: it is his function to elicit all the material evidence and assist in making straight the path of justice. Particularly was this true when it appeared to the learned judge below, engaged in a very long trial, that there was an insufficient or improper elucidation of the provable facts.

* * *

. . . It is unnecessary for us to consider the various individual witnesses interrogated by the court, for it is sufficient merely to say that the court was well within its province in attempting to ascertain the truth and is not subject to the criticism now advanced. It became necessary several times to require counsel to return to the issues on trial and the court did so with a wise exercise of discretion. These assignments of error are without merit."

In **Fidelity & Deposit Co. of Maryland v. Bates** (8 Cir. 1935) 76 F. 2d 160, 170 the Court said:

"The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the

truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses. Kettenback et al, v. United States (C. C. A. 9) 202 F. 377, 385."

II

DID THE COURT OF APPEALS PROPERLY PASS UPON THE FIRST QUESTION?

The argument that the Court of Appeals failed to discharge its duty to decide that the alleged bias and prejudice of the District Judge prevented the plaintiff from having a fair trial is best answered by the opinion of our Court of Appeals for the Fifth Circuit, which is included in the Appendix to the Petition (A 13-17). Not only did that court acknowledge that the plaintiff placed "the greatest stress" on the contention that he was denied a fair and adequate trial, but four of the five pages of the opinion are devoted to a discussion of the court's discretionary powers and his duty to "keep a case moving within the bounds of reason", the matter of denying continuances, and declining to hear arguments at the close of the trial in non-jury cases, and the right of the court to admonish counsel.

The record of the protracted trial for which plaintiff's counsel inexcusably failed to prepare clearly shows that the trial judge's adverse rulings were not only free of bias and prejudice but were wisely employed to curtail a long and tedious "fishing expedition" and to confine the testimony to the issues; that the court's interrogation of witnesses was required to ascertain the truth and make straight the path of justice; that his comments upon the weight of the evidence were both permissible and justified and any admonition was to prevent distortion of the facts.

CONCLUSION

For the reasons shown hereinabove the Petition for Writ of Certiorari should be denied and this long drawn out litigation concerning events extending over a period of almost thirty years should be terminated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the _____ day of August, 1959 I mailed a copy of the foregoing Brief to Leo S. Julian, Biscayne Building, Miami, Florida and to Jay E. Darlington, 306 Hammond Building, Hammond, Indiana, Attorneys for Petitioners, and to William G. Ward, duPont Building, Miami, Florida, and to Garland M. Budd, Olympia Building, Miami, Florida, Attorneys for Respondents, Original Defendants.

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